needed not only because of harmful error on a fundamental issue, but also because of doctrinal conflict.

B. The Second Question Should Be Reviewed

1. The Government begins its response on the second question presented, as on the first, by trying to avoid the issue. It says (without citation) that petitioners did not contend in the Federal Circuit that the Board resolutions created contract rights, but argued only for incorporation of the resolutions in the Assistance Agreement. Opp. 22. That is wrong. Petitioners argued at length that they had (express and implied) contract rights from multiple sources, *i.e.*, the RCMA, the Board resolutions, and the Assistance Agreement (Doumani *et al.* Ct. App. Br. 15-19, 22-30 (May 25, 2004)), and specifically *denied* that they were relying on incorporation of the Board resolutions by the Assistance Agreement. *Id.* at 22 (Petitioners "do not sue for breach of the Assistance Agreement. Instead, they sue for breach of the Overall Contract, of which the Assistance Agreement was but one component."). Petitioners thus preserved the issue.

2. Even on the merits, the Government tries to divert attention from the actual issue. The question is not whether Government resolutions, regulations, or statutes *generally* give rise to contract rights. Opp. 24-25, discussing *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451 (1985). It is whether certain types of resolutions—which are common—do. The Government cites no authority whatever that denies such rights where, as here, the resolutions approve particular persons' financial transactions with and for the benefit of the Government, address the persons who made the offer to the Government, and impose duties on those persons as part of the transaction.

As the Government recognizes, the *Winstar* plurality treated the Board resolutions as sufficient to create contract rights. Opp. 25-26. And contract law makes clear that they

are. Contrary to the Government's citation-less statement, the absence of "agrees," "contracts," or "promises" language, let alone of language separately "requiring payment of damages," Opp. 23, in no way defeats contractual enforceability where "the realities of the transaction favor[ ] reading those documents as contractual commitments." *Winstar*, 518 U.S. at 863 (plurality). Contract enforceability depends not on the form of words but on a common-sense understanding that the actions are justifiably viewed as commitments. *Restatement* § 2 & Comment b; *id.* §§ 3, 4, 202; *see* Pet. 28. The Government does not identify a single one of the required elements for contract formation that is somehow missing in the Board resolutions.

When petitioners assumed the various duties imposed on them by the resolutions, they were justified in relying on the resolutions' assurances about capital regulatory treatment as enforceable commitments, without which petitioners' commitments would have been economically irrational. The presence of *additional* documents that serve various purposes *partially* overlapping with the resolutions is not uncommon and does not change the contractual nature of the resolutions. And recognizing the resolutions as contracts does not undermine the separate treatment of the institutions and the individuals, who have different duties and benefits under the various resolutions and separate agreements. *Contra* Opp. 24. The Assistance Agreement, providing for a monetary infusion into the institutions, creates one set of duties and rights; the RCMA, addressing other issues, creates others (for petitioners and the institutions); and the resolutions create still others (including duties for petitioners beyond those imposed by the RCMA). *See* Pet. 6.

3. Other Federal Circuit decisions, notably *Home Savings of America v. United States*, 399 F.3d 1341 (Fed. Cir. 2005), and *La Van*, *supra*, have held that Board resolutions create contract rights, without additional privately signed agree-

ments. *See* Pet. 28-29. The Government cannot distinguish those decisions, which it acknowledges held Board resolutions to create contract rights. Opp. 26-28.

As to *Home Savings*, the Government focuses on the particular private duties imposed by the resolutions ("full financial responsibility"). Opp. 27. But the particulars of the duty are immaterial: here, too, the resolutions imposed duties on petitioners, which differ only in detail, not in their role as defining a bargain that makes the Board resolutions enforceable. As to *La Van*, the Government notes aspects of the opinion (*e.g.*, about state law regarding veil piercing), Opp. 27-28, that have nothing to do with the legal issue here: whether Board resolutions just like the resolutions here create enforceable contract rights. *La Van*, like *Home Savings*, but contrary to the ruling in this case, squarely held that they do. The second question should thus be taken along with the first.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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